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In The

Supreme Court of the United States

October Term, 1992

CONTINENTAL CASUALTY COMPANY,

Petitioner,

v.

FIBREBOARD CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO MOTION TO GRANT, VACATE REMAND ON GROUNDS OF MOOTNESS

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The action below was one for declaratory relief between a policyholder, Fibreboard Corporation, and its insurer, Continental Casualty Company. The issue was whether a District Court in California must apply California's public policy barring insurance recovery for California punitive damages awards to punitive damages awarded in other states which allow recovery. The case specifically involved punitive damages awarded against Fibreboard in a Texas class action (*Cimino v. Raymark Industries*) and a West Virginia consolidated action.

The District Court ruled in Fibreboard's favor, and the Ninth Circuit upheld the District Court. Continental

petitioned for a writ of certiorari, arguing that the lower courts' application of California's choice of law rules regarding the insurability of punitive damages awarded in the Texas class action violated due process. Continental's petition did not challenge either the lower court's finding that the insurance policy issued by Continental covered punitive damages, or its determination that Continental is obligated to indemnify Fibreboard for punitive damages awarded in the West Virginia consolidated action.

On virtually the eve of the Court's announcement of whether it has decided to grant or deny certiorari, Continental now attempts not only to avoid the Court's certiorari decision, but also to erase the lower courts' rulings.

According to Continental, the case is moot because it says it has reached a settlement with the plaintiffs in the *Cimino* Texas class action. **This** case has not settled at all. Fibreboard is not a party to the purported settlement of the *Cimino* case. On September 28, 1992, Continental's counsel informed Fibreboard's counsel that the Texas court was still reviewing related matters and that Continental expected signed orders shortly. The only order that Fibreboard is aware of reflects that the court has done no more than preliminarily approved the proposed settlement. Time to take any appeals from any such orders cannot have expired. The purported settlement cannot be sufficiently final as to render any part of this case moot. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 465, fn.3 (1978); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 371, fn.10 (1982); 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3533.2, at 234-235.

However, even if Continental had reached a final settlement with the Texas class action plaintiffs in *Cimino*, such would not justify vacating the lower court decisions in this case, for the following reasons:

1. Continental's purported settlement with the Texas class action plaintiffs should be regarded as a voluntary cessation of Continental's denial of its obligation to indemnify Fibreboard for punitive damages awarded in Texas. The Court has repeatedly stated that mere voluntary cessation of a challenged practice does not moot a case. *See United States v. W.T. Grant Co.*, 345 U.S. 629 (1953); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1983); *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67 (1983). More important, Fibreboard has no assurance that Continental will not deny its obligations in the future. Fibreboard continues to face potential liability for punitive damages in asbestos-related lawsuits throughout the country, including in the State of Texas. If the Court vacates the lower court decisions, then Fibreboard may be deprived of the collateral estoppel and precedence of those decisions, while Continental will be free to reassert a coverage position which the District Court and the Ninth Circuit have already decided is wrong. "The possibility that respondent may change its mind in the future is sufficient to preclude a finding of mootness." *United States v. Generix Drug Corporation*, 460 U.S. 453, 456 (1983).

2. Under the procedure described in *United States v. Munsingwear*, 340 U.S. 41 (1950), the Court may grant certiorari, vacate the decision below, and remand for dismissal of the case when the case becomes moot. "That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment,

review of which was prevented through happenstance." Id. at 40 [Emphasis added.] Here, *happenstance* would not prevent review, rather it is Continental's own actions which would prevent review. Such actions do not make a case moot. *See Karcher v. May*, 484 U.S. 72 (1987).

3. Continental's purported settlement involves only the Texas class action. As noted above, the lower courts also found that the insurance policy issued by Continental covered punitive damages and determined that Continental is obligated to indemnify Fibreboard for punitive damages awarded in the West Virginia consolidated action. Continental has made no claim that these other issues are moot. In *Duke Power Co. v. Greenwood Co.*, 259 U.S. 259, at 267 (1936), the Court stated: "Where it appears upon appeal that the controversy has become *entirely* moot, it is the duty of the appellate court to set aside the decree below and to remand the cause with directions to dismiss." [Emphasis added.] *See Great Western Sugar Co. v. Nelson*, 442 U.S. 92 (1979) (quoted language cited approvingly). Continental chose to petition for certiorari as to only a part of the lower court decision, and it chose to abandon the sole issue of its petition by agreeing to pay off the *Cimino* plaintiffs, and, yet, it now seeks to have the decision vacated in its entirety. *Munsingwear* does not license appellants to manipulate the appellate process.

4. Continental brought this action for declaratory relief. It received an adverse decision, but one which determined its rights and those of Fibreboard, which is the sole purpose of a declaratory judgment. Now it seeks, in effect to wipe out the collateral estoppel and *stare decisis* effect of the very decision it sought, not by settling

the issues in this case with Fibreboard, but by promising to pay a large sum of money to other parties, the *Cimino* Texas class action plaintiffs.

The majority of the Courts of Appeals takes the position that vacatur is not appropriate where mootness is attributable to the deliberate actions of the litigants, even more particularly where it is the actions of the party who lost below. *See Long Island Lighting Co. v. Cuomo*, 888 F.2d 230 (2nd Cir. 1989); *Clarendon Ltd. v. Nu-West Industries, Inc.*, 936 F.2d 127 (3rd Cir. 1991); *Northshore Development, Inc. v. Lee*, 835 F.2d 580 (5th Cir. 1988); *Constangy, Brooks & Smith v. National Labor Relations Board*, 851 F.2d 839 (6th Cir. 1988); *National Union Fire Insurance Co. v. Seafirst Corp.*, 891 F.2d 762 (9th Cir. 1989). *See also* J. Moore, *Moore's Federal Practice* § 416(6), at 543-544.

As Circuit Judge Easterbrook stated for the 7th Circuit:

> Litigants who settle their dispute while an appeal is pending often file a joint motion asking us not only to dismiss the appeal but also to vacate the opinion and judgment of the district court. We always deny these motions to the extent they ask us to annul the district court's acts, on the ground that an opinion is a public act of the government, which may not be expunged by private agreement. History cannot be rewritten. There is no common law writ of erasure.

In re Memorial Hospital of Iowa County, Inc., 862 F.2d 1299, 1300 (7th Cir. 1988).

Judge Easterbrook's words apply with even greater force here where one of the parties – Fibreboard – is not a party

to the settlement and had no involvement whatsoever in the effort to manufacture mootness.

As another Circuit, in *United States v. Garde*, 848 F.2d 1307, 1311 (D.C. Cir. 1988), recognized:

> The distinction between litigants who are and are not responsible for the circumstances that render the case moot is important. We do not wish to encourage litigants who are dissatisfied with the decision of the trial court 'to have them wiped from the books' by merely filing an appeal, then complying with the order or judgment below and petitioning for a vacatur of the adverse trial court decision.

If the Court were to grant Continental's motion it would encourage others to use *Munsingwear* as a writ of erasure.

For the foregoing reasons, Fibreboard respectfully asks the Court to deny Continental's motion.

Respectfully submitted,

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